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Agriculture, the EC and the WTO; a legal critical analysis of the concepts of sustainability and multifunctionality.

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Summary

The agricultural policies of the member states of the EC has for many years now been controlled from Brussels under the Common Agricultural Policy. In recent years the CAP has, together with other policies of the EC, been refocused from crop production support to a European Rural policy, with the term "sustainability" being written into many policy documents. This term has achieved international recognition, and the definition used by the Brundt Land commission has been widely accepted, as evidenced by its use in OECD documentation. While the term "sustainability" has been written into WTO texts, the robustness of the term is questionable. The question then arises as to the

legal interaction of WTO texts and Multi-lateral Environmental Agreements, which do have "sustainability" as their core philosophy. A new term has entered the regional and global debate in the policy area of agriculture, that of "multifunctionality". The EC is increasingly defining agriculture as being multifunctional. This term has yet to be clearly defined at and EC level, however the OECD has done some work in this area. How the Millenium round of WTO negotiations reacts to the term "multifunctionality" will have an important impact on the EC's Common Agricultural Policy.

Introduction

National agricultural policy is no longer the preserve of national governments. In most Western European countries national agricultural policies have been largely controlled by the regional governance structure of the EC. In addition, Agriculture is increasingly becoming a bone of contention in international trade disputes, as evidenced in the fact that the whole of the General Agreement on Tariffs and Trade under the Uruguay round of negotiations was held up pending the resolution of the Agricultural trading issues between the three main negotiating parties at the international level, the EC, the USA and the Cairns group, which resolution was eventually reached at Blair House in November 1992. Conflicting issues of feeding an increasing global population, at a reasonable price, while maintaining our respective bio-diversities, local ecosystems and rural populations, are continuing issues of debate. Differences in social priorities in different areas around the world will increasingly have an impact on the international debates on Agriculture in this increasingly globalised world. The Agricultural policy of

the EC will be strongly influenced by WTO Agricultural agreement commitments. In depth examination of the interaction of the Agricultural policy of the EC and the WTO is merited. For the purposes of this paper, I propose, however, to focus on the interaction between these two levels of governance, and then to limit my examination to the approaches of these two levels of governance to the issues of sustainability and multifunctionality, together with the views of the OECD in this area, and to analyse the possible impact of this divergence on Agricultural policy.

EC - legal articulation with the WTO

The EC is unusual in that it is the only RIA currently recognised as a member of the WTO,¹ however a full elaboration of the relationship remains outstanding.² In Opinion 1/94³ the ECJ held that the Common Commercial Policy of the EC currently enshrined in Article 133 EC⁴ entitled the Commission to develop an external Common Commercial Policy,⁵ with the Common Agricultural Policy being allied with the Common Commercial Policy. Matters such as the GATS⁶ and TRIPs⁷ were held to be outwith the delegated powers of the EC, and remained in the exclusive competence of the EC member states. EC Regulation 1600/95,⁸ as amended by Regulation 1170/96⁹ went on to implement the WTO Agreement on Agriculture into EC law.¹⁰

ECJ jurisprudence recognises that the EC was substituted for the Member States with regard to commitments under the GATT as far back as on the 1st July 1968, when

the EC introduced its Common Customs Tariff.¹¹ The ECJ has taken upon itself the role of interpreter of the GATT by way of preliminary ruling under Article 234 EC,¹² with regard to issues arising as and from that date, (1968).¹³

In 1972 the ECJ recognised that the provisions of GATT 1947 was binding on the Community,¹⁴ however the same case went on to say that the issue of whether or not an EC provision is illegal because it is in breach of a public international law obligation, it is necessary to establish; 1. the public international obligation is binding on the Community, and 2, where the proceedings are before a national court, that the rule is self-executing.¹⁵ Regard must also be had to the "spirit, the structure and the terms of the convention".¹⁶ In 1972 it was found that, because there was great flexibility in the earlier GATT, it was considered that the particular part of GATT in question at the time, was not self-executing. Such an argument would not be as persuasive with regard to the GATT 1994. The ECJ has yet to overturn a provision of EC law on the basis that it is incompatible with GATT rules,¹⁷ however Council Decision 94/800¹⁸ "stated that by its nature, the Agreement establishing the World Trade Organisation, including the annexes thereto is not susceptible to being directly invoked in Community or Member States Courts". The ECJ in *Commission v. Germany*¹⁹ stated that "the primacy of international agreements concluded by the Community over provisions of secondary legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements".²⁰

As neither the World Trade Organisation nor GATT is expressly referred to in the EC treaty,²¹ the relationship between the two organisations, in the context of EC jurisprudence, has been developed by way of case law of the ECJ. Article 302 EC²² does empower the European Commission, to "maintain such relations as are appropriate with all international organisations". European Law requires the EC to adhere to all of its international law commitments, with "the provisions of such an agreement" being deemed to form an integral part of the community system",²³ with an obligation being placed on the ECJ to ensure the "uniform application" of the terms of such agreements throughout the Community"²⁴ in order to ensure that they are not used to create barriers to trade.

The EC view of Sustainability and Multifunctionality

EC Sustainability

The European Community's environmental policy, which recognises the precautionary principle, operates through a framework of action programmes.²⁵ The fifth action programme²⁶ adopted the concept of sustainable development used in the Brundt Land report,²⁷ and developed the policy framework for its implementation within the EC. It goes on to say that "the implementation of such a strategy of sustainable development will require a considerable change in almost all major policy areas in which the Community is involved. It requires that environmental protection requirements be integrated into the definition and implementation of other Community policies, not just

for the sake of the environment, but also for the sake of the continued efficiency of the other policy areas themselves",²⁸ with the Agricultural sector being one of the sectors targeted under Chapter 4.4 of the programme.²⁹ The sixth action programme³⁰ develops the fifth action programme from a cross sectoral point of view.³¹ In addition to the action programmes,³² sustainability has been written into the EC treaty at Article 2 EC,³³ and Article 6 EC.³⁴

Given that free trade between member States is one of the more important policies within the EC, and the ultimate target of the WTO, it is interesting to compare the two organisations' approaches to the issue of environmental protection measures hindering or possibly hindering such free movement. The EC position is set out in the *Danish Bottles case*,³⁵ where, in the summary of the judgement the ECJ states, at paragraph 1, that "obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements recognized by Community law and are proportionate to the aim in view, in so far as they constitute a measure which least restricts the free movement of goods." The court went on to say that as the protection of the environment was one of the "Community's essential objectives", and as long as the measures taken were necessary and the "resulting restrictions" were not "disproportionate" then the environmental protection measures would be permissible. This is to be contrasted with the WTO Appellate Body's approach in the two *Tuna* cases,³⁶ and in the *Shrimp* case,³⁷ referred to later in this paper.

EC Multifunctionality

The European Community's views of multifunctionality are still at a policy stage, and have yet to be written into legal texts, however its concept, along with that of sustainability, is being strongly supported by the EC in light of the current round of WTO Agricultural talks.³⁸ It is the Agricultural directorate's view that the issue of multifunctionality in agriculture encompasses the issues of "safe and high quality goods", the protection of the environment, the saving of "finite resources", the preservation of rural landscapes,³⁹ and the contribution that agriculture makes to the "socio-economic development of rural areas including the generation of employment opportunities".⁴⁰ The European Commission is of the view that the "multifunctional character of agriculture" is a "key issue to be addressed in the WTO context".⁴¹ The EC recognised that agriculture provides "services" which are "mainly of a public good character".⁴² The importance of landscape includes "stonewalls, terraces, trees and farm woodlands and archaeological features" which contribute to the "cultural landscape".⁴³ The specific character of land as a commodity is recognised when the Commission states that unused land does "not automatically revert to its original wild state", and "continued usage" in a well adjusted way is a prerequisite for maintaining its environmental value.⁴⁴

Within the European Community, it is perceived that there is a tendency to "under provide" the public service element of agricultural production, as the producers of these

services are "often not or not sufficiently rewarded by the market".⁴⁵ The requiring of farmers to produce the "environmental benefits from land use" by virtue of the mere ownership of land could be considered an "infringement of private property rights", thus necessitating the carrot approach, of encouraging the provision of these services through an reward mechanism.⁴⁶ As stated by the Committee of the Regions, "farmers must be ready to observe basic environmental standards without compensation", however, if a "higher level of environmental service" is being provided, then farmers should be "remunerated by appropriate agri-environmental measures".⁴⁷

The philosophy of the EC with regard to the future of agriculture within the EC is reflected in Agenda 2000. Emphasis continues to be put on production, however the Commission has recognised that this is leading, to continuing pressure on landscape and its related bio-diversity,⁴⁸ of great important in the more fragile eco-system areas. The Commission has recognised that "a landscape can be regarded as a system comprising a specific geology, land use, natural and built features, flora and fauna, watercourses and climate," to which "should be added habitation patterns and socio-economic factors."⁴⁹ There is a fear in European agricultural circles that the production model of agriculture will result in the abandonment of the land by large numbers of marginal farmers to the extent that "scrub and forest encroach and the open landscape will disappear,"⁵⁰ which will not be easily recoverable. European Environmental policy, for its part, deals with some of the issues of sustainability in agriculture, with its directives on Habitats and Wild Birds,⁵¹ with the Habitats directive setting up "special areas of conservation" (SPAs) which have been vigorously defended by the ECJ in the case *Commission v. Germany*

(*Leybucht Dykes*),⁵² when it "made it clear that general economic and recreational interests do not allow for removal or destruction of SPA land".⁵³ The social issues of underlying agricultural reform are beginning to receive a specific focus within the agricultural directorate with the development of a European rural policy.⁵⁴

OECD - Sustainability

The definition of sustainability commonly used, and adopted by the OECD is that of the Brundt Land Commission, who defined sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".⁵⁵ Sustainability is seen as being "resource-oriented, long-term and global" in concept.⁵⁶ The OECD in examining the concept of Sustainability in their policy document "Policies to Enhance Sustainable Development", have noted the propensity for using economic growth as a measure for welfare.⁵⁷ The concept of sustainability is being promoted at a UN level through the Rio Conference,⁵⁸ which approved Agenda 21, the Johannesburg Summit,⁵⁹ and the UN Commission of Sustainable Development. One of the main tools in examining the concept of sustainability is the way, and the extent to which, "different types of capital can be substituted for each other", with such substitution not always being possible.⁶⁰ It is recognised that certain resources have critical thresholds, and in those circumstances "more stringent criteria for sustainability will apply".⁶¹

In designing policies which will be environmentally effective, the OECD has stated that the policies should secure "regeneration", "substitutability", "assimilation" and "avoid irreversibility".⁶² In cases where there is a "lack of scientific certainty" then the precautionary principle should be applied.⁶³ The use of the precautionary principle however, may cause problems, as different countries appear to take "different approaches to valuing potential risks involved in the implementation of precaution in practice". The OECD advocates that its member states should examine the possibilities for ensuring that the application of the principle of "precaution in environmental policy is more consistent with trade disputes".⁶⁴ In addition member state sustainability reviews of policies suffer from an under developed methodology for the measurement of sustainability, which still needs "to be further strengthened."⁶⁵

Analytical tools in this area still need to be worked on in order to adequately develop policies in this area.⁶⁶ Tools for the measuring of the "environmental services provided by natural resources" and different ecosystems, together with the measurement of their threshold points for irreversible damage, still requires further research,⁶⁷ as do "formal methods for estimating non-market values" of rural amenities, which still lack universal acceptance.⁶⁸ The dichotomy between private goods and public goods is recognised, however, the payment to landowners for the production of non-commodity, or public goods, such as "habitat for wildlife, and sinks for atmospheric carbon" is also problematic. The OECD advocates that payment should only be provided where "under-supply is a problem", and then only in such a way that does not weaken "the intrinsic

motivation of people to behave in an environmentally responsible manner".⁶⁹ In addition, issues such as habitat for symbiotic plants and animals, landscape, recreational opportunities and flood control are recognised as issues. The OECD advocates the development of research in order to "identify low-cost practices that can increase biodiversity without reducing crop and livestock production", with payments being made to farmers for compensation for "income losses resulting from application of these practices".⁷⁰

The structuring of current payments to farmers however needs to be revisited, as it is recognised by the OECD that "much of this support leaks to unintended recipients",⁷¹ with current support systems in most OECD countries benefiting "those producers who are best able to expand their operations".⁷² The use of the Generalised System of Preferences (GSP) by both the US and the EC for the purpose of "linking market access to compliance with labour and environmental standards"⁷³ was commented on, with this system being used effectively in many cases to promote sustainable development, and it is seen by the OECD as offering "some promise for the future".⁷⁴

OECD - multifunctionality

Multifunctionality as a concept has been examined by the OECD in their paper "Multifunctionality: towards an analytical framework".⁷⁵ The OECD is of the opinion that the term Multifunctionality "is not well defined" and is "prone to different

interpretations".⁷⁶ They identify two concepts of multifunctionality, the normative concept of multifunctionality, and the positive concept of multifunctionality. The normative concept is to view "multifunctionality in terms of multiple roles assigned to agriculture", with multifunctionality being "not merely a characteristic of the production process", but being a "value in itself", with the maintenance of the "multifunctional activity" being a policy objective in itself.⁷⁷ This approach to multifunctionality is rejected by the OECD as being unacceptable. The approach to multifunctionality adopted and examined by the OECD is what they term at the "positive" concept of multifunctionality".

The positive concept views multifunctionality as being a "characteristic of" any economic activity, but it is particularly prevalent in the agricultural and forestry industries. This concept examined the "multiple, interconnected outputs or effects". These effects can be either positive or negative, intended or otherwise.⁷⁸ These outputs are classified as commodity and non-commodity outputs. Under this model both land and labour are regarded as inputs, with the "role of biological processes in production, the close relationship with the environment, and the impact on the rural economy" all being relevant issues.⁷⁹ The non-commodity outputs are deemed to "exhibit the characteristics of externalities or public goods", a market for which either does not exist, or "functions poorly".⁸⁰ An issue arises as to whether the approach should be to develop a market in public goods, or to protect public goods from market exploitation. The OECD asks whether alternative strategies for farming, or the adoption of other technologies could "decouple", or alter the degree of "jointness between commodity and non-commodity

outputs", and if a market could be created for the provision of the "non-commodity outputs", which could operate separately from the existing commodity outputs of farming.⁸¹ The inclusion of issues of "rural employment and food security" in the OECD discussion on multifunctionality was highly controversial, and the taking into considerations of these issues may again become a problem in WTO discussions on the issue of multifunctionality.

It is recognised by the OECD report that multifunctionality may have "different effects" in countries with different levels of development, however the OECD is of the opinion that their analytical framework should be operable in all countries. The OECD warn that the use of the concept of "multifunctionality could have domestic or international equity, or income distribution implications",⁸² and these "direct and indirect costs of international spillover effects" need to be taken into account when utilising the concept of multifunctionality in designing Agricultural policies.⁸³

WTO and the environment.

While the WTO publicly states on its website that "commercial interests do NOT take priority over environmental protection",⁸⁴ the WTO, in the same document, equally states that it is "not the WTO's job to set the international rules for environmental protection". That is regarded as the task of the environmental agencies and conventions.⁸⁵ The WTO does recognise that it is "concerned with trade measures applied pursuant to

MEAs⁸⁶ which can affect WTO Member's rights and obligations".⁸⁷ Two problems arise from these statements. One is the relationship between the WTO and existing MEA's, and secondly, the strength of the current provisions on "sustainable" development within the WTO texts,⁸⁸ and any future provisions on multifunctionality. The WTO's Committee on Trade and Environment (CTE) differs from other WTO committees in that it does not "administer a formal WTO agreement".⁸⁹ The CTE is of the opinion that the WTO is "not the forum to decide upon the appropriateness of environmental criteria" and that its most controversial policy issue is that of eco-labelling,⁹⁰ within the parameters of the Technical Barriers to Trade (TBT) Agreement,⁹¹ and the examination of the extent to which eco-labelling is "trade distorting".⁹² The possibility of the development of a legal concept of sustainability, and the newer, and less developed concept of multifunctionality, at a WTO level, in line with the Doha agenda that "sustainable development should be the overarching goal" of the current negotiations,⁹³ within the current parameters of the WTO documentation and case law, would appear therefore to be somewhat stifled.

The WTO's prevailing fear is that "protectionary measures" are enacted in "the guise of environmental measures", leading to "green protectionism".⁹⁴ While the treaty provisions appear to give environmental protection, this protection, when relied upon at dispute settlement stage, currently appears to lack rigour. Both the Agreement on Agriculture and the Subsidies and Countervailing measures currently provide exemptions for environmental subsidies, however these may prove to be too limited to encompass the holistic approach needed to properly adopt the sustainability and multifunctionality

criteria, particularly if the precautionary principle is to be adopted, as advocated by the OECD.

The Agreement on Agriculture provides that "environmental subsidies may be exempt from commitments to reduce domestic support when certain conditions are met".⁹⁵ The Subsidies and Countervailing measures provides similar provisions. These subsidies, if applied within the parameters of the relevant agreement, are exempt from the WTO's dispute settlement procedure.⁹⁶ Article XX of the GATT permits "countries to take actions to protect human, animal or plant life or health, and to conserve exhaustible natural resources".⁹⁷ This provision proved to be less robust than would first appear in the *Tuna/Dolphin* Case.⁹⁸ While the report of the dispute settlement panel was not adopted into "GATT law" by the GATT Council, its report can be held "persuasive before subsequent dispute settlement panels".⁹⁹ The panel in this case held, unsurprisingly, that the import restrictions contravened Article XI. The issue arose as to whether exemptions could be claimed under either Article XX(b)¹⁰⁰ or (g)¹⁰¹ exceptions. Controversially the panel held that neither the protection of life or health (Article XX(b)) or exhaustible natural resources (Article XX(g)) could be relied on. In addition, an "extrajurisdictional interpretation of Article XX(g) was not permitted."¹⁰²

The Appellate Body in the second *Tuna* case¹⁰³ found that "parties are entitled to protect an environmental resource situated beyond its territorial jurisdiction".¹⁰⁴ The second tuna case found that, in order to rely on the provisions of Article XX exemptions it was necessary for there to be a "direct causal connection between the measure and the

environmental objective pursued."¹⁰⁵ This is a very limited view of environmental protection, and not compatible with a holistic approach which would be required in order to further the promotion of sustainable practices. Scott is of the view that *Tuna II* findings would only lead to environmental protection in the event of "drifting pollution" emanating from one member State "spilling over physically to the territory of the regulating state."¹⁰⁶ The two Tuna cases both point to very limited circumstances when the Article XX exemptions could be relied on in order to pursue environmental objectives.

The more recent *Shrimps* case¹⁰⁷ US environmental protection measures again failed to meet the Article XX environmental protection exemption test. This time the US legislation was held to fail WTO tests, in the view of the panel, on the basis that there was "unjustifiable discrimination between countries where the same conditions prevail".¹⁰⁸ The Appellate Body also attached "considerable importance to the failure of the United States" to follow the correct procedures to include "across-the board negotiations" with all the relevant parties before "enforcing the import prohibition".¹⁰⁹ It would appear that international meaningful negotiation between all relevant countries is required before environmental protection measures will be permitted under the Article XX provisions. The legal relationship between the WTO and Multilateral Environmental Agreements therefore becomes relevant.

The legal status of WTO - MEA relationships has also been causing concern amongst WTO member states,¹¹⁰ who are concerned not to "undermine environmental

negotiations". The WTO sees MEAs, as being "the best way of co-ordinating policy action to tackle global and transboundary environmental problems co-operatively".¹¹¹ While only approximately 20 out of the 200 MEAs currently in force contain trade provisions,¹¹² it is recognised that "MEAs and the WTO both represent different bodies of international law,¹¹³ and conflicts could arise in the future, given that MEAs as currently drafted "violated the principles of non-discrimination", breaching the "most-favoured-nation clause" permitting trade with some countries but not with others, and by violating the national treatment provisions by "allowing discrimination between domestic and imported products".¹¹⁴ In addition, a principle of international law, "lex specialis" throws a spanner in the works for the WTO. "Lex specialis" provides that "if all parties to a treaty conclude a more specialised treaty, the provisions of the latter prevail over those of the former",¹¹⁵ therefore it is highly conceivable that an MEA, under this principle, would prevail over the WTO agreements. This, according to the WTO web site is a "widely held view in the CTE".¹¹⁶ A concern to the CTE is the trade discrimination effects against WTO members who have not signed up to a particular MEA.¹¹⁷

Waiver provisions are provided for in Article IX of the WTO which could possibly be used for the purpose of MEA obligation recognition. These waivers are provided for however, only in exceptional circumstances, and are "subject to approval at a minimum by three-quarters of the WTO membership".¹¹⁸ The waivers are also time-limited. One proposal is to provide for "multi-year" waivers for the purpose of providing for "trade measures applied pursuant to MEAs, with such waivers being permitted only if they "meet specified criteria",¹¹⁹ presumably being minimally trade distorting. This whole

area of the "compatibility between good trade and environmental policies" has yet to be fully explored at a WTO level,¹²⁰ and presumably will become an issue at the Doha ministerial.

The Green and Blue Boxes

The Agreement on Agriculture provides for exemptions under the Green Box provisions,¹²¹ and exclusions under the Blue Box provisions.¹²² The Green box provisions permit¹²³ "payments under environmental and regional assistance programmes".¹²⁴ Payments under Green Box provisions, must be generally available to producers within the region¹²⁵ and can not be "related to, or based on, the type or volume of production",¹²⁶ with the "size of the payment related to the income loss incurred" and not on current behaviour¹²⁷ thereby limiting the effectiveness of developing green box payments as steering mechanisms in the development of more sustainable agricultural practices.¹²⁸ In addition Rude has pointed out that "the taxing of "negative environmental externalities" is possible under the Agreement on Agriculture, but the provision of "subsidies to encourage the generation of positive environmental externalities would be a problem" within the parameters of the Green box provisions.¹²⁹

Blue Box payments¹³⁰ do permit payments aimed at certain at "limited agricultural production",¹³¹ but again they do not permit for steering mechanisms aimed at encouraging sustainable farming practices. Safety net provisions¹³² again "shall relate

solely to income; it shall not relate to the type or volume of production".¹³³ Payments under environmental programmes are allowed, provided they are part of "a clearly defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions",¹³⁴ however, the payments "cannot exceed the extra costs of complying with the government programme" thereby limiting the attractiveness of such programmes to producers.¹³⁵ Equally the Special Safeguards provision in the Agreement on Agriculture equally does not provide the necessary mechanism for developing either the principles of sustainability or multifunctionality, as it can only be invoked if "the volume of imports of the concerned product in any year exceeds a certain trigger level or, but not concurrently, the import price falls below a certain trigger price".¹³⁶

Doha and Beyond

The WTO agricultural negotiations reopened in early 2000, under Article 20 of the WTO Agricultural agreement. The Doha ministerial is ongoing. The WTO Agricultural Committee agreed on the 26th March 2002 to "a work programme which would set out by 31 March 2003 the key negotiating principles for a final comprehensive farm deal",¹³⁷ with the date of the 1st of January 2005 being set as the deadline for "reaching a final agreement on agriculture and all other areas of negotiations that comprise the Doha Development Agenda". While the current focus are the "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support", it will

also include "some rule making". In the discussions, "non-trade concerns will be taken into account". How the issues of the non-trade concerns of sustainability and multifunctionality "will be taken into account" remains to be established, and will be dependent on the dynamics of the negotiating table. Hopefully this paper sheds some light on legal and policy thinking on these issues. The internationally recognised definition of sustainability of the Brundt Land commission has been adopted by both the OECD and the EC, and has been written into various policy documents. There is a fear of a lack of robustness of existing environmental measures at the WTO level, in light of the Appellate Body's jurisprudence in the two *Tuna* cases and the *Shrimps* cases. The issue arises that given the possibly weak adoption of the principle of "sustainability" has a general environmental principle how will the WTO be able to address the issue of "multifunctionality" in the policy area of agriculture. Should the WTO, during the current round of negotiations, fail to grasp the nettle of "multifunctionality" in a tangible way, how will this failure affect the EC Common Agricultural Policy and the evolving European Rural Policy, given the legal articulation between the EC and the WTO earlier discussed. If this scenario arises, what is the likelihood of the EC engaging in future WTO trading disputes with its global trading partners over agricultural products. We will have to wait and see. Interesting times may lie ahead, not only for European and Global Agricultural lawyers, but also for the farmers of Western Europe.

¹ Whether it is the EC, or its constituent member states which vote at WTO meetings is an internal matter for the EC.

² Frederick M. Abbott, "Law and Policy of Regional Integration - The NAFTA and Western Hemispheric Integration in the World Trade Organization System", Kluwer 1995, at page 32.

³ *Opinion 1/94* of 15.11.1994 Opinion pursuant to Article 228(6) of the EC Treaty. ECJ [1994] 5267

⁴ Article 113 EC, pre Amsterdam.

⁵ Introducing the concept of Implied Parallel Powers into EC jurisprudence. See Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO, *International and Comparative Law Quarterly*, Volume 45 April 1996, page 440, Andrea Appella.

⁶ While the cross-border direct supply of services was analogous to the trade in goods and therefore part of the Common Commercial Policy, the rest of the modes of the supply of services regulated by GATS i.e. consumption abroad, commercial presence and the presence of natural persons, exceeded the limits of Article 113 EC and the Common Commercial Policy: "The International Practice of the European Communities Current Survey, A Survey of the Principal Decisions of the European Court of Justice pertaining to International Law in 1994", Christopher Vedder and Hans-Peter Folz, page 131.

⁷ Article 113 only covered the provisions of TRIPs dealing with the fight against the release of counterfeit goods into free circulation, since these related to measures taken by customs authorities at the external frontiers of the Community. Intellectual Property rights did not relate specifically to international trade: "The International Practice of the European Communities Current Survey, A Survey of the Principal Decisions of the European Court of Justice pertaining to International Law in 1994", Christopher Vedder and Hans-Peter Folz, page 131.

⁸ OJ L 151, 1/7/1995, page 12.

⁹ OJ L 115, 28/6/1996, page 10.

¹⁰ Gavin McFarlane, 'Butter Matters', *Tax J.* 1998, 460, 21-22

¹¹ Joined Cases 267 - 269/81 *Annenistrasione delle Finanze dello State v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* (reference for a preliminary ruling from the Corte Suprema di Cassazione) [1982] ECR 801.

¹² Article 177 EC, pre Amsterdam.

¹³ Op. Cit. Footnote no. 11.

¹⁴ Case 21 - 24 /72 *International Fruit Company N.V. and others v. Productschap Voor Groenten en fruit (No 3)*) [1972] ECR 1219.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Op. Cit. Footnote no. 2, at page 56

¹⁸ O.J. L 336, 23/12/1994, p.1

¹⁹ Case C-61/94 *Commission v. Germany* [1997] 1 CMLR 281.

²⁰ Op. Cit. Footnote no. 10

²¹ Although reference is made to international reciprocal agreements under Article 310 EC, (Article 238 EC, pre Amsterdam).

²² Article 229 EC, pre Amsterdam.

²³ Case 104/51 *Hauptzollamt Manz v. C.A. Kupferberg & Cie. K.G. a.A.* (reference for a preliminary ruling from the Bundesfinanzhof) [1982] ECR 3641.

²⁴ Ibid.

²⁵ The first and second action programmes were started in 1972 and 1977 respectively. They concentrated on pollution control. The third and fourth action programmes, started in 1982 and 1987 respectively developed an emphasis on prevention, as well as continuing the development of policy on pollution control.

²⁶ 1993 to 2000. Resolution of the council and the Representatives of the governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, OJ C. 138, 17/5/1993, p 1.

²⁷ Introduction to the Fifth action programme, paragraph no. 5.

²⁸ Chapter 2, third paragraph.

²⁹ The other sectors are industry, energy, transport and tourism.

³⁰ Entitled Environment 2010: Our Future, our choice, COM (2001) 31, which is due to run from 2001 to 2010, available on the Europa web site.

³¹ With a prioritisation on issues such as climate change, nature and biodiversity, environmental and health issues, and natural resources and waste issues.

³² Entered into by the Community in pursuant to its remit under the Environmental Policy provisions of the EC treaty at Articles 174 to 176 EC.

³³ The Community shall have as its task..... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities....

³⁴ Environmental protection requirements must be integrated into the definition and implementation of Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

³⁵ Case C-302/86 *Commission v. Denmark* [1989] 1 CMLR 619

³⁶ 1991 ILM page 1594, and 33 ILM 839 (1994).

³⁷ *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body*, WT/DS69/AB/R

³⁸ "It is essential that the sustainability and multifunctionality principles underpin - and become the norm in - future world agricultural trade negotiations." Opinion of the Committee of the Regions on: the 'Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy'; ' Council Regulation (EC) on the financing of the common agricultural policy'; ' Council Regulation (EC) amending Regulation (EEC) No 1766/92 on the common organization of the market of cereals and repealing Regulation (EEC) No 2731/75 fixing standard qualities for common wheat, rye, barley, maize and durum wheat'; 'Council Regulation (EC) establishing a support system for producers of certain arable crops'; 'Council Regulation (EC) on the common organization of the market in beef and veal'; 'Council Regulation (EC) on the common organization of the market in milk and milk products'; 'Council Regulation (EC) amending Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector'; 'Council Regulation (EC) establishing common rules for direct support schemes under the common agricultural policy'; ' Council Regulation (EC) on support for rural development from the European Agriculture Guidance and Guarantee Fund (EAGGF)' CdR 273/98 fin, Official Journal C 93, 06/04/1999 p.

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³⁹ Reference has been made to the European Landscape Convention, adopted by the Council of Europe's Committee of Ministers on 19 July 2000, was signed on 20 October 2000 by 18 countries during a Ministerial Conference in Florence, by the European Commission in the EU: COM(2001) 31, Celex No.

501DC0031, European Union Preparatory Acts, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' - The Sixth Environment Action Programme /* COM/2001/0031 final */ , Managing the countryside.

⁴⁰ Info-Paper, Agriculture: Process of analysis and Information Exchange of the WTO; Contribution of the European Community on the Multifunctional Character of Agriculture, October 1999, Europa Website.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Opinion of the Committee of the Regions on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Directions towards sustainable agriculture" OJ C 156, 6/6/2000, page 40.

⁴⁸ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Directions towards sustainable agriculture (1999/C 173/02 EC C173/2 Official Journal of the European Communities 19.6.1999.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Council Directive 79/409/EEC on the Conservation of Wild Birds OJ L 103 1979 and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, p. 7.

⁵² Case 57/89 *Commission v. Germany (Leybucht Dykes)* [1989] ECR 2849.

⁵³ Ibid.

⁵⁴ under Directorate E of the Agricultural Directorate general.

⁵⁵ Policies to Enhance Sustainable Development; OECD 2001, quoting from WECD. 1987 World Commission on Environment and Development (WECD) (1987), *Our Common Future*, Oxford University Press, Oxford, UK

⁵⁶ Multifunctionality: Towards an Analytical Framework, OECD , OECD 2001

⁵⁷ Policies to Enhance Sustainable Development; OECD 2001

⁵⁸ The Rio Conference on the Environment and Development (UNCED) in 1992

⁵⁹ Johannesburg Summit 2002; World Summit on Sustainable Development, 26 August to 4 September 2002, <http://www.johannesburgsummit.org/>

⁶⁰ Op. Cit. Footnote no. 57

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ The UK Government have been developing Sustainability indicators. See <http://www.sustainable-development.gov.uk/indicators/index.htm>

⁶⁷ Op. Cit. Footnote no. 57

⁶⁸ Ibid. quoting from OECD, *Valuing Rural Amenities*, Paris, 2001

⁶⁹ Op. Cit. Footnote no. 57, at page 92.

⁷⁰ Ibid. at page 93, referring to OECD (1999), *Handbook on Incentive Measures for Biodiversity: Design and Implementation*, Paris.

⁷¹ Op. Cit. Footnote no. 57

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Op. Cit. Footnote no. 56.

⁷⁶ Op. Cit. Footnote no. 56.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ 10 common misunderstandings about the WTO <http://www.wto.org>

⁸⁵ Ibid.

⁸⁶ Multilateral Environmental Agreements.

⁸⁷ Report of the WTO Committee on Trade and the Environment, Press/ TE 014, 14 November 1996, <http://www.wto.org>, quoting from PC/SCTE/W/3, 12 October 1994.

⁸⁸ Such as the Report of the WTO Committee on Trade and the Environment, Press/ TE 014, 14 November 1996, <http://www.wto.org>, quoting from the Decision of 14 April 1994, Ministers meeting on the occasion of signing the Final Act embodying the results of the Uruguay Round of multilateral Trade negotiations at Marrakech on 5 April 1994, which provides "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". In addition the preamble of the WTO Agreement refers to the objective of sustainable development, and to the "need to protect and preserve the environment, in a manner consistent with countries' needs and levels of economic development". The Doha agenda states that sustainable development should be an overarching goal of the negotiations.

⁸⁹ Environment: Trade and Environment News Bulletins, TE/019 -July 1997 <http://www.wto.org>

⁹⁰ Environment: CTE Agenda Part 3, CTE on: how environmental taxes and other requirements fit in, <http://www.wto.org>.

⁹¹ Ibid.

⁹² Environment: Trade and Environment News Bulletins, TE/019 -July 1997, <http://www.wto.org>.

⁹³ John Clarke; WTO: Now the Hard Work Really Begins, *INTTLR* 2002, 8(2), 39-52.

⁹⁴ Halina Ward; Trade and the Environment in the Round - and after, Trade and the Environment, *Journal of Environmental Law*, Vol. 6, no. 2, 1994.

⁹⁵ Environment: CTE Agenda part 2, CTE on: environmental protection and the trading system, <http://www.wto.org>.

⁹⁶ Ibid.

⁹⁷ Op. Cit. Footnote no. 84.

⁹⁸ 1991 ILM page 1594.

⁹⁹ Op. Cit. Footnote no. 94

¹⁰⁰ Article XX(b) provides the measures which are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade" and which are "necessary to protect human, animal or plant life or health" are exempt.

¹⁰¹ Article XX(g) provides the measures which are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade" and which relate to "the conservation of exhaustible natural resources if....made effective in conjunction with restrictions on domestic production or consumption".

¹⁰² Op. Cit. Footnote no. 90

¹⁰³ *Tuna/Dolphin II*, 33 ILM 839 (1994).

¹⁰⁴ Joanne Scott; On Kith and Kine (and Crustaceans): Trade and Environment in the EU and the WTO; in Weiler, J.J. H.(ed.) *The EU, the WTO and the NAFTA* Oxford university Press, 2000

¹⁰⁵ Op. Cit. Footnote no. 104

¹⁰⁶ Ibid.

¹⁰⁷ *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body*, WT/DS69/AB/R

¹⁰⁸ Op. Cit. Footnote no. 104

¹⁰⁹ Ibid.

¹¹⁰ Environment: Trade and Environment News Bulletins TE/036 - 6 July 2001, Committee on Trade and environment's (CTE) meeting on 27-28 June 2001, <http://www.wto.org>.

¹¹¹ Report of the WTO Committee on Trade and the Environment, Press/ TE 014, 14 November 1996, <http://www.wto.org>.

¹¹² Environment: CTE Agenda Part 1, CTE on: trade rules, environmental agreements and disputes, and PC/SCTE/W/3, 12 October 1994, <http://www.wto.org>.

¹¹³ Op. Cit. Footnote no. 111.

¹¹⁴ Environment: CTE Agenda Part 1, CTE on: trade rules, environmental agreements and disputes,
<http://www.wto.org>.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Environment: CTE Agenda part 5, CTE on: environmental and trade liberalisation, <http://www.wto.org>.

¹²¹ Article 6.1 of the Agreement on Agriculture and Annex 2.

¹²² Article 6 Agreement on Agriculture.

¹²³ Agreement on Agriculture, Articles 2.2-2.13.

¹²⁴ Kevin C. Kennedy, Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations,
(2001) *Journal of World Trade* 35(6): 1061-1079,

¹²⁵ James Rude, Under the Green Box; the WTO and Farm Subsidies, (2001) *Journal of World Trade* 35(5);
1015-1033,

¹²⁶ WTO Agreement on Agriculture, Annex 2, paragraph 6

¹²⁷ Op. Cit. Footnote no. 125

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ under Annex 2, Article 6.

¹³¹ Op. Cit. Footnote no. 124

¹³² WTO Agreement on Agriculture, Annex 2, paragraph 7

¹³³ Op. Cit. Footnote no. 125

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Jai. S. Mah, Reflections on the Special Safeguard Provision on the Agreement on Agriculture of the
WTO, (1999) *Journal of World Trade*, 33 (5), 197-204.

¹³⁷ "WTO members set schedule to meet 12-month "modalities" deadline" , Press release, Press/282, 27th

March 2002, <http://www.wto.org>